STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 15, 2014
v	No. 313087 Kent Circuit Court
JUAN CARLOS RUIZ, Defendant-Appellant.	LC No. 12-000571-FH

Before: MURPHY, C.J., and O'CONNELL and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals by right his convictions for arson of a dwelling house, formerly MCL 750.72(a), conspiracy to commit arson of a dwelling house, MCL 750.157a; formerly MCL 750.72(a), arson of insured property, formerly MCL 750.75, using a computer to commit a crime, MCL 752.796; MCL 752.797(3)(f), and perjury during an investigative subpoena hearing, MCL 767A.9(1)(a). The trial court sentenced defendant to 5 to 20 years' imprisonment for arson of a dwelling house, 5 to 20 years' imprisonment for conspiracy to commit arson of a dwelling house, 5 to 10 years' imprisonment for arson of insured property, 5 to 15 years' imprisonment for perjury during an investigative subpoena hearing, and a consecutive sentence of 5 to 20 years' imprisonment for using a computer to commit a crime. We affirm defendant's convictions and his sentences.

Defendant's convictions arose out of a fire that burned a house he owned. The parties stipulated that the cause of the fire was arson. At trial, Lee Pegues and Dustin Mieras testified that defendant had planned the arson and that they had participated in the arson at defendant's direction while defendant was out of the country. In addition, a witness to the fire testified that she had seen Mieras at the fire scene; prior to trial she had identified the individual in a photographic array. Other witnesses testified at trial about the nature of the fire, the firefighting effort, and the communications among defendant and the two individuals. Defendant did not testify at trial, but his testimony from an investigative subpoena hearing was read into the record. In that hearing, defendant had denied any connection with the fire and denied any knowledge of who might have been involved with the fire.

On appeal, defendant first argues that the trial court erred by allowing the prosecution to read his investigative subpoena testimony into evidence. Specifically, defendant contends that the testimony was inadmissible because the prosecution failed to advise him that he had a right to

counsel during the investigative hearing. Defendant did not object to the admission of his subpoena testimony at trial; accordingly, we review this unpreserved issue for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To warrant reversal, defendant must demonstrate that admission of the testimony was erroneous, and that the error "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id*. at 774.

The admission of the investigative subpoena testimony into evidence does not warrant reversal in this case. The transcript of the investigative hearing demonstrates that defendant agreed to appear at a time that fit within his plans for travel, and that he agreed that the prosecution could serve the investigative subpoena at the hearing. The transcript further demonstrates that the prosecution advised defendant on the record that there was an investigation into a possible arson and advised him that he had "a right to refuse to answer any question if a truthful answer to a question would tend to incriminate [him] personally." In addition, the prosecution advised defendant: "Anything you do say may be used against you in a subsequent legal proceeding. If you have a lawyer, you certainly are permitted a reasonable opportunity to talk to a lawyer if you so desire."

Defendant now alleges that these warnings did not adequately advise him of his constitutional rights. We disagree, for two reasons. First, the circumstances surrounding defendant's investigative subpoena hearing did not implicate the constitutional concerns described in *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966) (acknowledging that "the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery."). "In the paradigmatic *Miranda* situation—a person is arrested in his home or on the street and whisked to a police station for questioning—detention represents a sharp and ominous change, and the shock may give rise to coercive pressures." *Howes v Fields*, ___ US ___; 132 S Ct 1181, 1190; 182 L Ed 2d 17 (2012). In this case, defendant agreed to appear at a time that was convenient for him, and he acknowledged that he would be traveling outside of Michigan after the hearing.

Second, the advice of rights given to defendant did not amount to plain error requiring exclusion of the testimony. The advice correctly informed defendant of his rights during questioning pursuant to the investigative subpoena. That is, he did not have an absolute right to remain silent; rather, he had an obligation to answer truthfully, subject only to the condition that he could not be compelled to incriminate himself. See MCL 767A.5(1), (5). Similarly, although the prosecution's advice concerning counsel was not a talismanic incantation of the *Miranda* rights, the advice "touched all the required bases" in a manner that adequately informed defendant of his rights. See *People v Hoffman*, 205 Mich App 1, 14; 518 NW2d 817 (1994).

Aside from his claim of constitutional violations, defendant also maintains that the prosecution's warnings did not satisfy the statutory provisions governing investigative subpoenas. Pursuant to these provisions:

> Any person may have legal counsel present in the room in which the inquiry is held. The person may discuss fully with his or her legal counsel any matter

> relating to the person's part in the inquiry without being subject to citation for contempt. [MCL 767A.5(3).]

The right to counsel during these proceedings is a statutory right, not a constitutional matter. According to statute, a subpoena issued under these provisions must include, among other information, "[a] statement that the person may have legal counsel present at all times he or she is being questioned . . . ." MCL 767A.4(1)(g). In regards to defendant's constitutional right against self-incrimination, the statute also indicates that, unless the individual has been granted immunity, "The prosecuting attorney shall inform the person of his or her constitutional rights regarding compulsory self-incrimination before asking any questions under an investigative subpoena." MCL 767A.5(5).

Regarding defendant's right to an attorney, information regarding this should have been conveyed to defendant in his subpoena, MCL 767A.4(1)(g), and defendant does not contend that this information was not contained in his subpoena. Although defendant did not receive the subpoena until his appearance, the trial court approved this method of service, and defendant also indicated that he had agreed to be served in this way. On these facts, the subpoena and the process service do not appear defective, and defendant does not attempt to make such an argument. Instead, he asserts that the prosecution failed to adequately advise him of his right to counsel on the record. However, contrary to defendant's arguments, the statute does not require the prosecution to provide such information verbally before questioning. Given that no such provision exists, it should not be added by the courts. See *People v Carruthers*, 301 Mich App 590, 604; 837 NW2d 16 (2013) ("Provisions not included in a statute should not be included by the courts."). In contrast to the lack of required verbal warning regarding a right to counsel, the statute does expressly require a verbal warning regarding compulsory self-incrimination. MCL 767A.5(5). Under the maxim of *expressio unius est exclusio alterius* (the expression of one thing suggests the exclusion of all others), the express requirement of a verbal warning regarding the right against compulsory self-incrimination implies that such a verbal warning is not required regarding the statutory right to counsel. See *Carruthers*, 301 Mich App at 604.

Even if the warnings were not consistent with the controlling statute, there was no plain error in admitting the investigative subpoena testimony into evidence. This Court has specifically declined to apply the exclusionary rule as remedy for violation of MCL 767A.1 *et seq*. *People v Gadomski*, 274 Mich App 174, 183; 731 NW2d 466 (2007). Correspondingly, the Michigan Supreme Court has declined to "extend the drastic remedy" of exclusion of evidence to a violation of MCL 767A.1 *et seq*. *People v Earls*, 477 Mich 1119; 730 NW2d 241 (2007). Accordingly, even if the prosecution failed to adequately inform defendant of his right to counsel within the meaning of the controlling statute, defendant was not entitled to exclusion of his investigative subpoena testimony.

Defendant next argues that the trial court erred by admitting e-mail records into evidence. Defendant objected at trial to the admissibility of the e-mail evidence in Exhibit 13, but made no objection to the admissibility of other e-mails. We review the preserved objection to the trial court's ruling for an abuse of discretion. *People v Orr*, 275 Mich App 587, 588; 739 NW2d 385 (2007). We review the unpreserved evidentiary challenges for plain error.

We conclude the trial court was within its discretion in admitting Exhibit 13. We further conclude that there was no plain error in the trial court's rulings on the other e-mail evidence. The authentication of the evidence is governed by MRE 901, which states in relevant part:

> **(a) General Provision.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> **(b) Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
>
> (1) *Testimony of Witness With Knowledge.* Testimony that a matter is what it is claimed to be.
>
> * * *
>
> (4) *Distinctive Characteristics and the Like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.
>
> * * *
>
> (9) *Process or System.* Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

In determining whether evidence has been sufficiently authenticated, "[i]t is axiomatic that proposed evidence need not tell the whole story of a case, nor need it be free of weakness or doubt. It need only meet the minimum requirements for admissibility." *People v McDade*, 301 Mich App 343, 353; 836 NW2d 266 (2013) (citation omitted). "Beyond that, our system trusts the finder of fact to sift through the evidence and weigh it properly." *People v Berkey*, 437 Mich 40, 52; 467 NW2d 6 (1991). As a related matter, "the admission of real evidence does not require a perfect chain of custody." *People v White*, 208 Mich App 126, 130; 527 NW2d 34 (1994). Rather, "any deficiency in the chain of custody goes to the weight of the evidence rather than its admissibility once the proffered evidence is shown to a reasonable degree of certainty to be what its proponent claims." *Id.* at 130-131.

In this case, the e-mails in question were offered by the prosecutor, who asserted that they were e-mails sent by defendant to Mieras and Pegues relating to the planning of the arson. The e-mail in Exhibit 13 was introduced during Mieras's testimony. He testified that the document appeared to be identical to an e-mail he received from a sender named Ashley Kasniak. Mieras testified that he knew that the e-mail was from defendant because defendant told him to expect an e-mail relating to the arson.

Mieras's identification of the e-mail as one sent by defendant, coupled with the surrounding context, was sufficient to authenticate the e-mail under MRE 901. By way of analogy, this Court previously recognized that "a telegram may be authenticated if its contents and the surrounding circumstances indicate that the information it discloses is uniquely within

the purported sender's knowledge . . . ." *People v Thompson*, 111 Mich App 324, 328; 314 NW2d 606 (1981).

To the extent defendant argues that there were breaks in the chain of custody because police no longer had access to the e-mail account, his claim is without merit. A police officer detailed the process by which he created the screen shots, printed them, and stored them on a disc. This evidence was sufficient to establish a basic chain of custody for the evidence. And, in any event, breaks in the chain of custody relate to the weight of the evidence, not its admissibility. See *White*, 208 Mich App at 130. Thus, the trial court did not abuse its discretion in admitting Exhibit 13 into evidence.

The other exhibits at issue were also properly authenticated. Both Mieras and Pegues identified defendant as the sender based on the circumstances and content. Given this testimony, there was sufficient evidence that the documents were what the prosecution purported them to be as required by MRE 901(a). Thus, defendant has not shown plain error related to the admission of these exhibits.

Next, defendant contends that the prosecutor engaged in misconduct by vouching for the credibility of certain witnesses. Defendant further contends that his counsel was ineffective for failing to object to the prosecutor's misconduct. We review the unpreserved claim of prosecutorial misconduct for plain error. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). We review the ineffective assistance of counsel claim for mistakes apparent on the record. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009).

In this case, defendant challenges the prosecutor's questioning about plea agreements for Mieras and Pegues and the questioning about those witnesses understanding of the necessity of truthful testimony. We consider the prosecutor's questioning "as a whole" in light of "defense arguments and the relationship they bear to the evidence admitted at trial." *Callon*, 256 Mich App at 330. Although a prosecutor may not vouch for a witness,

> the simple reference to a plea agreement containing a promise of truthfulness is in *itself* [not] grounds for reversal. A more accurate statement of the law appears to be that, although such agreements should be admitted with great caution, admissibility of such an agreement is not necessarily error unless it is used by the prosecution to suggest that the government had some special knowledge, not known to the jury, that the witness was testifying truthfully. [*People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995).]

The prosecution's questions in this case did not indicate that the prosecutor possessed special knowledge regarding the witnesses' truthfulness. Instead, the prosecutor's remarks simply made the jury aware that the witnesses had plea agreements which included provisions requiring them to testify truthfully. This questioning was permissible. See *Bahoda*, 448 Mich at 276. Likewise, the prosecutor could, as a general matter, inform the witnesses that they could face perjury charges if they gave false testimony. *People v Layher*, 238 Mich App 573, 587; 607 NW2d 91 (1999), aff'd 464 Mich 756 (2001). The prosecution's related statements during closing arguments were similarly permissible. See *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005). Moreover, even assuming some error in any of the prosecutor's

questions or arguments, the trial court's jury instructions alleviated any error. See *Callon*, 256 Mich App at 329. The trial court instructed the jury that the lawyers' statements, arguments, and questions were not evidence and that whether to believe witnesses was a question for the jury to decide.

Given that the prosecutor's remarks were not improper, it follows that counsel was not ineffective for failing to object. To establish the ineffective assistance of counsel, a defendant bears the burden of demonstrating: (1) that "counsel's representation fell below an objective standard of reasonableness," and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v Meissner*, 294 Mich App 438, 459; 812 NW2d 37 (2011), citing *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Relevant to the present argument, counsel will not be found ineffective for failing to make a futile objection. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Defendant also maintains that his counsel was ineffective for failing to request a cautionary instruction on accomplice testimony, and that the lack of the instruction denied defendant a fair trial.

Although defendant now argues an accomplice instruction was appropriate, at trial defendant waived any claim of error relating to the jury instructions when his trial counsel approved the instructions as given by responding "no" when asked if he had any objection to the instructions. See *People v Kowalski*, 489 Mich 488, 504-505; 803 NW2d 200 (2011). At any rate, we find no clear error in the lack of a specific accomplice instruction where the issue of the witnesses' credibility was plainly presented to the jury, there were jury instructions on credibility, and there was other evidence in support of defendant's guilt. *People v Reed*, 453 Mich 685, 692; 556 NW2d 858 (1996). Defendant has not demonstrated error and thus cannot demonstrate that his counsel was ineffective with regard to the lack of an accomplice instruction.

In another challenge related to the jury, defendant maintains that the trial judge erred by remarking about the expected length of the jury deliberations. Specifically, defendant challenges the judge's remark that deliberations could be expected to last between five minutes or three to four hours. According to defendant, this remark indicated judicial partiality. We review this unpreserved claim for plain error. *People v Jackson*, 292 Mich App 583, 597; 808 NW2d 541 (2011). In reviewing a claim of partiality, we apply a presumption that the trial judge was impartial. *People v Wade*, 283 Mich App 462, 470; 771 NW2d 447 (2009). The party asserting partiality has the burden of overcoming the presumption. *Id*.

The record in this case does not support defendant's contention of judicial partiality. To determine whether a trial court's comments or conduct deprived a defendant of his right to an impartial trial, this Court has explained that:

> The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments "were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial." [*People v Conley*, 270 Mich App 301, 308; 715 NW2d 377 (2006) (citation omitted).]

In addition, we must view the record as a whole to determine whether, in context, the challenged remarks demonstrated bias. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

Taken in context, the judge's remark in this case was merely the provision of scheduling information. The judge stated,

> So my guess is before 11:00, certainly before noon on Monday, you're going to have the case. I would guess you're probably going to have your verdict on Monday. That's my expectation. I don't know how long it will take you to deliberate, but just in a lifetime of trying cases, a case this length usually takes about a half a day, at the most, for the jury to decide.
>
> But it's up to you, you know. You'll know. It could take you five minutes, five hours, could take you three days. My guess [is] it's going to be somewhere between five minutes and three or four hours would be my guess, but that's what we'll find out on Monday, whether that's correct or not.

Later, the trial court again emphasized that the length of time for deliberations was up to the jury. He explained:

> I don't know whether it will take you five minutes, 50 minutes, five hours, or five days to reach a verdict. My expectation is it will be something substantially less than five days, but anything short of that, it's kind of up to you. I have had jurors where I've gone back and talked to them, we had a verdict about after half an hour, but we felt like we needed to make it look better or whatever. Don't worry about it. When you have your verdict, you'll have your verdict. It could be real quick, or long. Whichever it is, it will be the appropriate time period.

The judge's remarks did not show any bias or opinion as to defendant's guilt or innocence. Further, the trial court instructed the jury that they alone determined the facts of the case and, specifically, that if they believed the trial court had an opinion on the case they should pay no attention to that opinion. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Consequently, any potential prejudice to defendant caused by the trial court's remarks was alleviated by these instructions.

Defendant also challenges his sentence and his counsel's effectiveness at sentencing. Defendant maintains that the trial court incorrectly assessed points against him under offense variables (OVs) 9 and 13. We review the trial court's factual findings on scoring decisions for clear error, and we review de novo any issues regarding application of the facts to the law. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

We conclude that the preponderance of the evidence supports the trial court's scoring of OVs 9 and 13. Under OV 9, the trial court must score 25 points when "[t]here were 10 or more victims who were placed in danger of physical injury or death, or 20 or more victims who were placed in danger of property loss." MCL 777.39(1)(b). The sentencing guidelines further instruct that the court should "count each person who was placed in danger of physical injury or loss of life or property as a victim." MCL 777.39(2)(a). Of particular relevance to the present

facts, emergency personnel who are placed at risk of injury or death, such as firefighters responding to an arson fire, may qualify as victims for purposes of OV 9. *People v Fawaz*, 299 Mich App 55, 63; 829 NW2d 259 (2012).

The record in this case indicates that the fire endangered at least twelve individuals: three civilian responders, four firefighters, and five neighbors in a nearby house. All of these individuals qualified as "victims" for purposes of OV 9. Although there may have been additional firefighters who were endangered and additional neighbors who were either personally endangered or at risk of property loss, no proof of additional victims was required. The evidence was sufficient to assess 25 points against defendant under OV 9.

The evidence was also sufficient to assess 10 points against defendant under OV 13 for a "continuing pattern of criminal behavior." MCL 777.43(1). A trial court must assess 10 points when "the offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property . . . ." MCL 777.43(1)(d). Whether a crime constitutes a crime against a person or property is determined by reference to the legislative classification of felonies into the six categories identified in MCL 777.5. *People v Bonilla-Machado*, 489 Mich 412, 422; 803 NW2d 217 (2011); see also MCL 777.11 through MCL 777.19.

In this case, defendant correctly recognizes that he has two felony convictions arising from the present criminal episode which may be used to score OV 13—namely, arson of a dwelling and arson of insured property, which, at the time of defendant's conviction, constituted crimes against a person and property respectively. See MCL 777.16c (as amended by 2000 PA 279).[1] Defendant argues, however, that he does not have a third felony which may be used to score OV 13. We disagree. Defendant was convicted of, among other offenses, arson of a dwelling, conspiring to commit arson of a dwelling, and using a computer to conspire to commit arson of a dwelling. On these facts, in keeping with the plain language of the statute, the "underlying offense" is arson of a dwelling. For purposes of OV 13, because the offense category for using a computer to commit a crime is determined "based on the underlying offense," it follows that using a computer to commit a crime has the same offense category as arson of a dwelling, not conspiracy. See MCL 777.17c(2). Accordingly, on the facts of the present case, use of a computer to commit a crime constitutes a crime against a person. See MCL 777.16c (as amended by 2000 PA 279); MCL 777.17c(1), (2). Defendant thus has three convictions involving crimes against persons or property, and OV 13 was properly scored at 10 points. MCL 777.43(1)(d).

Because OV 9 and OV 13 were properly scored, defendant is not entitled to resentencing. See MCL 769.34(10). Similarly, because there was no scoring error on these variables, defendant has not demonstrated that counsel provided ineffective assistance by failing to object to the scoring.

---

[1] The statutory provisions relating to arson and the classification of arson have been amended since defendant's conviction.

In a supplemental brief, defendant argues that the judicial fact-finding required for assessing points under the sentencing guidelines is unconstitutional. In support, defendant cites *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013). This Court rejected the same argument in *People v Herron*, 303 Mich App 392, 404-405; ___ NW2d ___ (2013) (*Alleyne* does not implicate Michigan's sentencing scheme). We decline defendant's invitation to reconsider the *Herron* reasoning.

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly